

# U.S. Exports and Intellectual Property Issues

## Copyright 101

July 25, 2012

1:00 – 2:30 a.m. Central



Susan Anthony, Attorney-Advisor  
Office of Policy and External Affairs, USPTO  
[Susan.Anthony@uspto.gov](mailto:Susan.Anthony@uspto.gov) - (571) 272-9300

Ohio

Small Business  
Development Centers

**SBA**.GOV  
U.S. Small Business Administration



# Speaker Biographies

**Susan Anthony** is an attorney with the Office of Policy and External Affairs, United States Patent and Trademark Office (USPTO), Alexandria, Virginia. Susan handles policy matters relating to trademarks, domain names, and copyright issues within the U.S. and internationally and has a broad range of experience and expertise in almost all facets of intellectual property.

She is a strong and very enthusiastic proponent of helping small businesses to understand how intellectual property can be used to promote economic growth. She is actively involved in the USPTO's educational outreach efforts for small- to medium-sized businesses ("SMEs"), including the USPTO "IP Basics" programs and the USPTO China Road Shows, as well as the USPTO's educational outreach initiative for Native American communities.

Prior to joining the USPTO, Susan worked as a corporate lawyer and in private legal practice in intellectual property.



# Learning Objectives

- 1. The definition and importance of a copyright,
- 2. The categories of works that are protected;
- 3. The registration process; and
- 4. The elements of a copyright infringement case.



# True or False?

I can make a copy without asking the copyright owner's permission if –

1. The work is out of print or otherwise unavailable.
2. I paid the contractor to make it (and, in fact, I paid quite a lot).
3. I made at least 7 changes to the work (or I changed 20% of it).
4. I found it on the Internet.
5. I am making a copy for my personal use only (cont'd next slide).



# True or False? (cont'd)

I can make a copy without asking the copyright owner's permission if –

6. I am making a copy for my research files and not for public distribution.
7. I provided the necessary attribution on the copy to the copyright owner.
8. There is no copyright notice on the work.
9. I did not make any money off the use of the work.
10. I found the work in the public library.





# U.S. Constitution (1787)

“The Congress shall have Power...To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their Respective Writings and Discoveries.

*-- Article 1, Section 8, Clause 8*



# What is Copyright?

Copyright is a legal protection for the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works.



# What Works are Protected?

- Work must be **fixed** in a tangible form of expression.
- The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device.





# What Works are Protected?

- Must be an **original** work of authorship, meaning that the work must be independently created by the author (as opposed to copied from other works).
- The U.S.' required level of originality is very low. Other countries' laws may differ in this respect.



# Categories of Protected Works

- Literary works
- Musical works
- Sound recordings
- Dramatic works
- Choreographic works
- Pictorial, graphic and sculptural works
- Motion pictures
- Architectural works



# Works from Pre-existing Works

- Compilations
- Derivative Works



# What Works are Not Protected?

- Works that have not been fixed in a tangible form of expression
- Titles, names; familiar symbols or designs; mere variations of lettering; mere listings of ingredients or content
- Ideas, procedures, concepts, principles (as opposed to a description of an idea, concept, etc.)
- Works consisting entirely of common property, containing no original authorship



# Copyright: A Bundle of Rights

- Make copies
- Prepare derivative works (i.e., adapt)
- Distribute copies
- Perform the work publicly
- Display the work publicly





# Securing Protection

- Copyright protection is secured **automatically** upon creation (fixation). A work is “created” when it is fixed in a copy for the first time.
- No publication or registration is required. (There are, however, certain definite advantages to registration.)



# Securing Protection – A Myth Debunked (I Trust)

From the U.S. Copyright Office website FAQs:

**I've heard about a “poor man's copyright.”  
What is it?**

The practice of sending a copy of your own work to yourself is sometimes called a “poor man's copyright.” **There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration.**



# Why Register?

- Registration puts others on notice of copyright claim.
- Registration (of works of U.S. origin) is required to file suit in federal court.
- Registration is prima facie evidence of validity of the copyright and facts in certificate (if made within five years of publication).
- Registration may be recorded with U.S. Customs and Border Protection (CBP) to help prevent importation of pirated products.
- Statutory damages and attorney's fees may be claimed in court suits, provided registration is obtained within three months after publication of the work or prior to infringement of the work.
- Easier to license work, collect royalties, and enforce your rights outside of court.



# What is “Publication”?

“Publication is the distribution of copies...of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies...to a group of persons for purposes of further distribution...constitutes publication. A public performance or display of a work does not of itself constitute publication.”

-- *U.S. Copyright Office, Circular 1, page 3*



# Registration Process

A copyright owner must:

- File an application;
- Pay a nominal filing fee (\$35); and
- Deposit copies of the work at the Copyright Office. Some of the works may be added to the collections of the Library of Congress.





# Registration

- Registration is administered by the U.S. Copyright Office of the Library of Congress
- Forms available at [www.copyright.gov](http://www.copyright.gov)
- Registration does not involve complex examination of applications as for patents and trademarks



# Notice

- **No notice is required** (for works published on or after March 1, 1989).
- Notice may benefit the owner against a supposed “innocent infringer.”
- Forms of notice: ©, the word “Copyright,” or the abbreviation “Copr.”, year of publication, and name of the copyright owner.



# Why Use a Copyright Notice?

- It informs the public that the work is protected by copyright;
- It identifies the copyright owner;
- It shows the year of first publication;
- It defeats an “innocent infringer” defense.

**TIP:** Provide sufficient additional information so that a third-party knows how to contact you to obtain your permission to use the work.



# Term of Copyright

For works created on or after January 1, 1978:

- **Life + 70:** In the U.S., copyright subsists from creation and lasts the full life of the author, plus 70 years after the author's death.
- **95 Years from Publication:** If the author is not a natural person, then copyright lasts 95 years from publication or 120 years from creation, whichever expires first.



# Ownership of Copyright

- Copyright initially belongs to the individual authors
- Joint authors are co-owners of, i.e., they have an undivided interest in, the copyright in joint works
- Under the work-made-for-hire doctrine, the employer is the owner of the copyright for works created within the scope of employment
- Special rules apply to “commissioned works”





# Who is an employee?

- Right to control the manner and means of production
- Skill required
- Employee benefits
- Tax treatment
- Right to assign additional projects
- Tools
- Location of work



# Transfer of Copyright

“Any or all of the copyright owner’s exclusive rights...may be transferred, but the transfer of *exclusive* rights is not valid unless that transfer is in writing....

Transfer of a right on a *nonexclusive* basis does not require a written agreement.”

-- *U.S. Copyright Office, Circular 1, page 6*



# Copyright Infringement

Infringement is a violation of any of the exclusive rights of copyright.



# Elements of a Copyright Infringement Case

- Validity and ownership of a copyright
- Wrongful copying of protected expression



# Proving Infringement

- Direct Evidence of Infringement  
or
- Circumstantial evidence of infringement:
  - Access to plaintiff's copyrighted work
  - Unlawful copying of the work as evidenced by
  - Substantial similarity of original and infringing work





# Liability for Infringement

- Direct Liability
- Contributory Liability
  - Knowledge of infringement (actual or constructive)
  - Material contribution
- Vicarious Liability
  - The right and ability to supervise
  - Financial interest



# Limitations & Exceptions

- First sale doctrine (the garage sale rule);
- Special exceptions for libraries, archives, and teaching;
- Certain statutory licenses;
- Certain television & radio exceptions;
- Reproduction for those with disabilities;
- Single software copy for archival purposes.



# Fair Use

“Fair Use” is a limitation of copyright.  
Use for purposes such as:

- Criticism or comment,
- News reporting,
- Teaching, Scholarship or Research.



# Four Factor Test

The following factors are codified at 17 USC Sect. 107:

1. The **purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The **nature of the copyrighted work**;
3. The **amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and
4. The **effect of the use upon the potential market** for or value of the copyrighted work.



# Fair Use Checklist

- Does the use infringe exclusive rights protected by copyright?
- Is the use of the work “commercial,” or for nonprofit purposes such as criticism, commentary, education, or news reporting?
- Is the use “transformative,” bringing new expressive meanings to the copyrighted material?
- How much of the copyrighted material is being used?
- Does the use impact an existing market for the work, or one that is likely to be exploited in the future?

**TIP: There is no bright line rule.**



# Copyright Remedies

- Actual damages
- Statutory damages
- Injunctions, including temporary and permanent
- Impounding infringing copies
- Destroying infringing copies and the machinery and equipment used to produce them
- Attorney's fees and costs





# The WIPO “Internet” Treaties

- Negotiated in 1996 under the auspices of the World Intellectual Property Organization, part of the United Nations.
- The WIPO Copyright Treaty entered into force with 30 ratifications on March 6, 2002.
- The WIPO Performances and Phonograms Treaty entered into force with 30 ratifications on May 20, 2002.
- The U.S. implemented the Treaties through the Digital Millennium Copyright Act (DMCA).



# Three New Obligations Established

- The Right of Making Available to the Public;
- Legal Protection of Technological Measures to Protect Copyrighted Works (“TPMs”); and
- Legal Protection of Rights Management Information (“RMI”).



# Digital Millennium Copyright Act (DMCA)

- 1998 U.S. implementation of the treaties;
- Extends U.S. copyright law into the digital realm;
- Prohibits circumvention of technological protection measures;
- Prevents tampering with rights management information;
- Limits infringement liability for Internet Service Providers (ISPs) that meet certain criteria.



# Notice and Takedown System

- Once an ISP receives a proper notice alleging infringement, it must expeditiously take the material down and notify the user.
- The user may then respond to the notice and the ISP must put back the material (i.e., put-back-up) if no court order is filed by the right holder.



# For more information...

Some copyright-related websites of possible interest:

- US Copyright Office website:  
<http://www.copyright.gov/>
- “Taking the Mystery Out of Copyright” (for students and teachers):  
<http://www.loc.gov/teachers/copyrightmystery/#>
- From the Copyright Society of the USA:  
[http://www.csusa.org/caw/caw\\_2006\\_teachers.htm](http://www.csusa.org/caw/caw_2006_teachers.htm)  
<http://www.csusa.org/face/>  
<http://www.copyright.iupui.edu/index.htm>



# For more information...

Some more copyright-related websites:

- Stanford Copyright and Fair Use Center  
<http://fairuse.stanford.edu/>
- “Copyright Term and the Public Domain in the United States” [Chart]  
[http://www.copyright.cornell.edu/public\\_domain/](http://www.copyright.cornell.edu/public_domain/)
- “Crash Course in Copyright” from the University of Texas  
<http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm>
- “Copyright Navigator” by Lionel S. Sobel  
<http://navigator.carolon.net/>





## In appreciation ...

Thank you for the opportunity to speak with you today.

Susan Anthony

Attorney-Advisor

Office of Intellectual Property Policy and Enforcement

United States Patent and Trademark Office

Post Office Box 1450

Alexandria, Virginia 22313-1450

571-272-9300 (main) or 571-272-8459 (direct)

[Susan.Anthony@uspto.gov](mailto:Susan.Anthony@uspto.gov)